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In The

Supreme Court of the United States

October Term, 1998

ADAM HERMAN; DIONNE DUROSARO-KELSON; MICHELLE FITZPATRICK; SHAWN DAVILA; KELLEE ANTHONY; KENYA NEWELL; PAULETTE RUIZ; LASHAWNDA BONNER; ASHIREA MOORE; FANNIE SMITH,

Petitioners,

-against-

BLOCKBUSTER ENTERTAINMENT GROUP; VIACOM INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Whether a written agreement conferring on one entity control of employee relations of an associated entity, together with evidence of common management and common ownership, constitutes indicia of control sufficient to trigger the integrated enterprise doctrine under Title VII of the Civil Rights Act of 1964.

2. Whether statements to the public by common owners of associated entities holding out that the two entities are a partnership and that one entity will manage the associated entity is sufficient to trigger the integrated enterprise doctrine under Title VII of the Civil Rights Act of 1964.

3. Whether under Title VII, the only way two entities can be considered an integrated enterprise, is when all elements of the Supreme Court's four-part test exist, *i.e.*, (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and, (4) common ownership or financial control.

LIST OF PARTIES

The parties to the proceeding in the Second Circuit Court of Appeals were the petitioners Adam Herman, Dionne Durosaro-Kelson, Michelle Fitzpatrick, Shawn Davila, Kellee Anthony, Kenya Newell, Paulette Ruiz, Lashawnda Bonner, Ashirea Moore, and Fannie Smith, and the respondents Blockbuster Entertainment Group, and Viacom International, Inc.

RULE 29.6 STATEMENT

The petition is not filed on behalf of a corporation, and Rule 29.6 does not apply.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Adam Herman, Dionne Durosaro-Kelson, Michelle Fitzpatrick, Shawn Davila, Kellee Anthony, Kenya Newell, Paulette Ruiz, Lashawnda Bonner, Ashirea Moore, and Fannie Smith, respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit, decided June 4, 1999, which affirmed a grant of summary judgment dismissing petitioners' complaint brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-, et seq.; the New York Human Rights Law § 290, *et seq.*; and decisional law of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is not officially reported and can be found at 1999 U.S. App. LEXIS 11976 (2d Cir. 1999)(decided June 4, 1999)(a1).[1] The decision of the district court is reported at 18 F. Supp.2d 304 (S.D.N.Y. 1998) (a4).

BASIS FOR JURISDICTION

On June 15, 1999, the court of appeals entered final judgment. This Court has jurisdiction to review the judgment of the court of appe\als pursuant to 28 U.S.C. § 1254(1).[2]

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[1]The opinion is reprinted in the Appendix to the Petition, cited by the page number therein as "(a___)." Citations to other materials in the record below will be to "[A____]" (referring to the joint appendix filed in the Second Circuit).

[2]The district court had jurisdiction over the claims of discrimination and other claims pursuant to 28 U.S.C. § 1331; 28 U.S.C.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e(b), defines "employer" as "a person engaged in an industry affecting commerce, who has fifteen or more employees for each working day."

STATEMENT OF THE CASE

A. Introduction

Petitioners (hereinafter collectively referred to as "HERMAN" or "petitioners"), seek declaratory relief, injunctive relief and damages to redress the deprivation of their rights from discriminatory employment practices on the basis of sex, *viz.*, sexual harassment, race, and retaliation perpetrated by DISCOVERY ZONE, LP (hereinafter "DZ"), an entity associated with respondent, (hereinafter collectively referred to as "BLOCKBUSTER" or "respondents"), herein.

Petitioners in the above-captioned action are comprised of African-American and Latina women, who were victims of egregious acts perpetrated by their male managers employed by DZ, and BLOCKBUSTER, that constituted illegal sexual harassment in violation of Title VII and the laws of the State of New York. The first-named petitioner, ADAM HERMAN, was constructively discharged after opposing the aforementioned unlawful employment practices. [A38]

After filing charges with the United States Equal Employment Opportunity Commission (hereinafter "EEOC"), the EEOC concluded, after an intensive investigation, that nine of the respondents "were victims of sexual harassment, race and, in the case of Ruiz, national origin discrimination by the Respondent[.] [A489] Reasonable cause findings as to retaliation and

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§ 1343; and 42 U.S.C. § 2000e-5(f)(3), in addition to the pendent jurisdiction of the district court to hear and decide claims arising under State law. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

constructive discharge claims were made regarding two petitioners. [A490]

Additionally, the EEOC found the following:

> In each instance, however, the [charging parties] and Ms. Torres [not a party to this action] were victimized after their GM/harasser had been the subject of previous sexual harassment complaints to DZ's regional management. Evidence that DZ failed to enforce its sexual harassment policy after repeated complaints of inappropriate conduct by a supervisor is sufficient to support a claim for punitive damages.

[A490]

During the final stages of the EEOC's investigation, DZ submerged into bankruptcy. [A709]

B. Statement of Facts

DZ is a chain of children's indoor recreational facilities with approximately 300 outlets in the U.S. and Europe. [A143] Five facilities operate in the New York metropolitan area which include the facilities where the complained of action occurred. DZ's national headquarters are located at 110 East Broward Boulevard, Fort Lauderdale, Florida. The regional headquarters are at 65 Madison Avenue, Morristown, New Jersey. [*Id.*] DZ was incorporated in Delaware on April 14, 1993; 49% of its capital stock is owned by BLOCKBUSTER, a division of Viacom; 11.3% is owned by McDonald's Corporation; and, 39.7% is publicly traded. [*Id.*] In April of 1995, it was announced to the public that:

> Viacom's Blockbuster to Run Discovery Zone: Viacom Inc. is taking a firmer hand with Discovery Zone Inc., an indoor-playground company in which it is the largest shareholder.

> Viacom said yesterday its Blockbuster Entertainment Group division has entered into a five-year management agreement with Discovery Zone, effectively putting Discovery Zone under Viacom's wing. Viacom owns 49.9 percent of Discovery Zone through Blockbuster.

[A495, A657].

Concerning this development, in 1995, Steven Berrard, president and Chief Executive Officer of BLOCKBUSTER, was quoted as saying, 'We have had a long, successful relationship with Discovery Zone as a shareholder, former franchisee and joint venture partner." [A658]

Notably, in 1995, DZ and BLOCKBUSTER also had the same Chief Financial Officer, and at least one other common officer: Sumner M. Redstone, Viacom's chairman who was also on DZ's board of directors. [A493].

B. The Five-Year Management Services Agreement

On April 17, 1995, BLOCKBUSTER entered into a Management Services Agreement (hereinafter "MSA") with DZ whereby BLOCKBUSTER agreed to assume control over all DZ management duties. [A219]

The MSA is most problematic for BLOCKBUSTER in that it flies in the face of any argument that there is an arm's length relationship between DZ and BLOCKBUSTER in their purported business dealings with each other. (Also consider, for example, the joint appendix at A661, which is a copy of a memorandum to district managers and general managers for DZ regarding hiring practices. The contact is Mike Caruso, an executive with BLOCKBUSTER; the phone number that is listed after his name is for BLOCKBUSTER.).

Whether the MSA is read piecemeal or in its entirety, the conclusion remains the same:

> Blockbuster shall provide the overall coordination

> and supervision of the business of the Company [DZ] and its subsidiaries and shall direct and manage the day-to-day operations and business affairs of the Company [DZ] and its subsidiaries.

[A219]

The MSA was in effect when most of the violations alleged herein took place; a reasonable jury would conclude, after considering the evidence adduced at trial, that an extraordinary relationship existed between BLOCKBUSTER and DZ sufficient to constitute an integrated enterprise. [A666]

The MSA mandated that BLOCKBUSTER would handle "human resource and personnel administration services, including (A) employee and labor relations" at the "local level." [A221] Al Detz, the Chief Financial Officer of DZ and BLOCKBUSTER simultaneously during the time the within violations occurred, admitted in his deposition that "local level" included the Manhattan DZ. [A559, A560]

Petitioners respectfully submit that the MSA, together with the facts set forth herein pointing to further indicia of control of DZ by respondents, creates an adequate nexus by which this Court should hold BLOCKBUSTER to be an employer for purposes of Title VII under the integrated enterprise doctrine.

C. Further Indicia of Control

The MSA, which conferred upon BLOCKBUSTER an extraordinary right to control the day to day operations of DZ, together with other facts proffered herein, illuminates a unique interrelationship between these entities. The following indicia of control were presented to the courts below to consider and were ignored. These facts, combined with the language of the MSA, belie the claims made by BLOCKBUSTER that they are not so related with DZ so as to constitute a single employer:

1. BLOCKBUSTER processed DZ's payroll [A718, A731];

2. BLOCKBUSTER handled DZ's insurance claim processing [A718];
3. BLOCKBUSTER prepared DZ's tax returns [A718];
4. BLOCKBUSTER handled DZ's computer operations [A718];
5. BLOCKBUSTER guaranteed a bridge loan for DZ [A718];
6. BLOCKBUSTER transferred 30-70 financial accounting people from BLOCKBUSTER to DZ [A718];
7. BLOCKBUSTER provided legal services to DZ [A718];
8. BLOCKBUSTER included DZ's financial statements with its own financial statements [A719];
9. Steve Berrard and Al Detz acted as CEO and CFO, respectively, of both BLOCKBUSTER and DZ [A727];
10. Sumner Redstone, the Chairman of the Board and CEO of Viacom, served on DZ's Board of Directors [A587, A727];
11. Detz's admission that BLOCKBUSTER's guarantee of the loan was a transfer of assets to DZ. [A538]
12. Joint filings by DZ and BLOCKBUSTER with the SEC. [A635]
13. Advertising and marketing activities were conducted for DZ by BLOCKBUSTER. [A636]
14. BLOCKBUSTER prepared payrolls, taxes, insurance claims and computer operations at the local level which included DZ New York, Bronx and Yonkers. [A539, A560]
15. Berrard and Detz had the authority to make and implement employment decisions at DZ. [A545]
16. Accounting records were kept by BLOCKBUSTER regarding DZ as it related to

BLOCKBUSTER. [A583]

17. A666, is a copy of a 1993 DZ shareholders newsletter wherein DZ clearly sets forth to their shareholders exactly what their relationship is with Blockbuster well before the acts complained of herein took place:

a. "Blockbuster is an invaluable resource to Discovery Zone in systems development, construction management, purchasing and training." [A674]

b. "Discovery Zone also has access to Blockbuster's expertise in advertising, promotions, and data base management and utilization." [A674]

c. "In one of the year's most significant developments, we established a partnership with Blockbuster Entertainment Corporation, one of the world's pre-eminent marketers with a proven track record in creating multi-location, high-growth business." [A673]

d. "As our largest franchisee, Blockbuster formed a new subsidiary, Blockbuster Children's Amusement Corporation, with a dedicated management team which is responsible for all Discovery Zone FunCenter development by Blockbuster." [A673]

e. "Blockbuster plans to develop a minimum of 125 franchised FunCenters in North America by late 1995." [A673]

f. "In addition, Discovery Zone and the principals controlling the sole Blockbuster video store franchisee in Mexico formed a company to develop up to 70 Discovery Zone FunCenters in that

country over the next four years." [A673]

g. "Our joint venture with Blockbuster in the United Kingdom will open its first FunCenter early in 1994." [A673]

h. "Blockbuster's sound financial condition and experience with rapid growth make it a uniquely valuable partner." [A670]

i. "We also formed a strategic partnership with Blockbuster Entertainment Corporation, one of the world's premier companies." [A670]

j. "The Discovery Zone 1994 calendar offers discount coupons on FunCenter admissions -- and coupons to use with kids' video rentals at Blockbuster..." [A683].

k. "Discovery Zone's marketing partners include many of the world's best known brands such as Blockbuster Video..." [A684]

18. A661, is a copy of a memorandum to district managers and general managers for DZ regarding hiring practices. The contact is Mike Caruso, an executive with BLOCKBUSTER. The phone number listed after his name is for BLOCKBUSTER.

19. At A662, is a copy disclaimer letter that Viacom received after they forwarded a copy of the within amended complaint. The denial names only Viacom as the insured; however, at page 3, the reader finds that the disclaimer is not predicated on the fact that DZ is not covered, rather the disclaimer states: "The alleged discrimination does not meet the definition of 'personal injury' since it all allegedly occurred in New York and because it was directly related to plaintiffs'

employment by an insured [DZ]." The carrier makes no distinction between Viacom and DZ; a reasonable juror could infer from this together with the aforementioned facts that BLOCKBUSTER and DZ are one and the same for purposes of insurance coverage, and, therefore, one and the same for purposes of Title VII.

20. A493 is a *New York Times* article cited only to support the uncontested claim that Sumner Redstone, Viacom's Chairman was also on DZ's Board of Directors.

21. A657-660 is a newswire replete with party admissions inculpating BLOCKBUSTER. For example:

> Blockbuster Entertainment Group is a unit of Viacom Inc. with businesses in entertainment retailing, television and film production, live entertainment and pay cable. The Group is composed of Blockbuster Entertainment, Showtime Networks Inc. And Paramount Parks, as well as Discovery Zone FunCenters. [A659]

Also included in this document is Steve Berrard *qua* president and CFO of BLOCKBUSTER, stating: "We have had a long successful relationship with Discovery Zone as a shareholder, former franchisee and joint venture partner." [A658]. That statement is in direct contradiction to BLOCKBUSTER's assertion that a partnership was not formed with DZ. [BB35] This particular statement is not hearsay in that it is offered only to show that it was made, not to prove the truth of the matter

asserted. *See generally* Fed. R. Evid. 801(c). Another theory for its admissibility at trial is that it is legally operative language. Legally operative language is not hearsay even if it sets forth the exact proposition to be proven. Roger C. Park, *Trial Objections Handbook*, § 4.01 p. 103 (Clark Boardman Callaghan 1983).

22. A667-668 is an article from the *Wall Street Journal*, also containing a party admission: Donald Flynn, DZ's Chairman and CEO of DZ in 1994 who was also one of BLOCKBUSTER's seven Directors at that time, stated:"With Blockbuster taking control of the company, Discovery Zone is in the process of rewriting its business plan." [A667]

This document will also be admissible at trial for the alternative reasons mentioned in the preceding paragraph.

23. A669-686 is the DZ shareholder newsletter, signed by Donald Flynn, which will be offered at trial only to show that they were made, not to prove the truth of the matter asserted. *See generally* Fed. R. Evid. 801(c).

Additionally, the statements made by Donald Flynn in the newsletter will be offered to show their effect on the aggrieved persons and on the public at large.

D. BLOCKBUSTER, DZ, and the EEOC -- The United Defense

The lower courts gave no weight to the fact that petitioners filed their charges of discrimination with the EEOC in November of 1995, naming as respondents the following entities:

1. Discovery Zone, LP in Chicago;
2. Discovery Zone, Regional Headquarters, New Jersey;
3. Discovery Zone, Manhattan;
4. Viacom, Inc.; and,
5. Blockbuster Entertainment Group, Florida.

[A688, A689]

Remarkably, one position statement was interposed for respondents by TAYLOR, on Blockbuster Entertainment letterhead, which begins as follows:

Dear Mr. Mingione:

Blockbuster Entertainment Group, a division of Viacom Inc. ("Blockbuster") recently took over management of Discovery Zone Inc. ("DZ" or the "Company"). As labor employment counsel for Blockbuster, I submit the following position statement on behalf of DZ.

* * *

Respectfully submitted,
BLOCKBUSTER ENTERTAINMENT GROUP
on behalf of Discovery Zone, Inc.

Johnny C. Taylor, Jr.
Senior Corporate Counsel
Labor & Employment

[A510]

Interestingly, in the position statement TAYLOR employs "we" when referring to actions taken by DZ.

Assuming, *arguendo*, that respondents were separate entities from DZ, a conflict of interest would have been extant prohibiting TAYLOR's joint representation of the BLOCKBUSTER, VIACOM, and DZ during the course of the EEOC investigation.

E. Who Made Final Employment Decisions? A Blockbuster Attorney

TAYLOR's investigation culminated in the final decision that no illegal sexual harassment had been perpetrated by DZ, and suggested that petitioners request a Right to Sue letter for the purpose of commencing the instant action. [A497]

As part of the Joint Appendix at A500, A501, A502, and A503, are copies of correspondence, all dated August 28, 1995, sent by petitioners law firm on behalf of the petitioners herein to DZ at the subject Manhattan location, its regional headquarters, its national headquarters, and the office of general counsel for BLOCKBUSTER.

Cognizant of the relationship between Viacom, BLOCKBUSTER and DZ, petitioners' counsel sent further correspondence, dated September 6, 1995, to Viacom's National Headquarters and directly to General Counsel for BLOCKBUSTER. [A504, A505]

On September 13, 1995, Harry A. Keely, Esq., a partner in petitioners' counsel's firm, received a telephone call from TAYLOR. TAYLOR stated that he was in the legal department of Blockbuster Entertainment Group, which he further stated, owned 49% of Discovery Zone, and was the controlling interest. [A498]

At that time, Mr. Keely advised that the purpose of the aforementioned correspondence and the focus of their telephone conversation, as far as he was concerned, was to determine whether or not the companies involved had a policy of pre-suit negotiation and settlement.

TAYLOR said he was in charge of precisely that machinery. TAYLOR further advised that the procedure would be for Mr. Keely to get his clients' version together and send it to TAYLOR. TAYLOR advised that he and a Human Resources team would investigate and then come to Keely's law firm to discuss the cases if they had merit.

Mr. Keely advised that as soon as all of the claims had been detailed, he would be prepared to discuss them with

TAYLOR. TAYLOR said he would wait to hear from Keely.

In accordance with the aforementioned telephone conversation which took place on September 13, 1995, Mr. Keely forwarded a letter to TAYLOR, dated October 13, 1995. [A506] In addition to providing the information TAYLOR had requested, said letter advised TAYLOR that charges would be filed with the EEOC on October 30, 1995.

In a subsequent telephone conversation, on October 25, 1995, TAYLOR agreed to comply with Keely's request that none of Keely's clients referred to in the October 13, 1995 correspondence, would be questioned outside of the presence of their counsel. [A509]

Soon after Mr. Keely's conversation with TAYLOR on October 25, 1995, and transmission via facsimile of the October 25, 1995 letter from Mr. Keely to TAYLOR confirming that conversation, one of the petitioners herein, Dionne Durosaro-Kelson, was contacted by Laurie Fleurant (HUMAN RESOURCES) for the purpose of arranging a meeting to discuss the charges, in disregard of TAYLOR's agreement. [A496]

The next day, October 26, 1995, petitioners, Lashwanda Bonner, Kenya Newell and Michelle Fitzpatrick, were contacted by Laurie Fleurant for the same aforementioned purpose, also in disregard of TAYLOR's agreement. [A498]

On October 30, 1995 at approximately 5:30 p.m., TAYLOR called this law firm to speak with Harry Keely. Mr. Keely was not present. TAYLOR spoke with Jonathan P. Flamhaft, Esq., an attorney associated with Harry A. Keely, Esq. TAYLOR advised that he had completed his investigation. TAYLOR stated that based upon a number of statements, he had determined that no illegal sexual harassment had transpired. [A496]

TAYLOR further advised that one of the statements obtained during the course of the investigation, alleged that Dionne Durosaro-Kelson called an unnamed DZ employee, told that employee that she was suing DZ, and that said employee should also sue DZ. TAYLOR told Mr. Flamhaft that he expected Mr. Flamhaft to scream retaliation, but Human Resources was

going to call Durosaro-Kelson in to to his offfice to speak with her. TAYLOR further stated: Durosaro-Kelson will be put on notice that her alleged conduct, wherein she called the aforementioned employee, constituted a breach of loyalty that Durosaro-Kelson owed DZ. [A497]

Mr. Flamhaft then advised TAYLOR that pursuant to the aforementioned correspondence, dated October 13, 1995, that petitioners' charges were in the process of being filed with the EEOC. TAYLOR then suggested that a Right to Sue letter be requested from the EEOC and that petitioners should commence an action in federal court. TAYLOR further stated that it was his preference to conduct depositions before settlement negotiations, and that he expected respondents' law firm to obtain his permission prior to speaking with DZ employees. [A497]

Finally, TAYLOR advised that he would be leaving New York City and be back in his office in Ft. Lauderdale on October 31, 1995 at 8:00 a.m., at which time he would fax a letter to Harry A. Keely, stating the aforementioned position. Said letter was never received by this office. [A497]

In response to correspondence regarding employment matters at DZ sent to Discovery Zone, Blockbuster and Viacom, only a Blockbuster attorney responded: TAYLOR.

Furthermore, TAYLOR advised Mr. Keely that BLOCKBUSTER was the controlling interest of DZ. TAYLOR went so far as to say that he was in charge of the "machinery" that handled pre-suit negotiations and settlement [A498], and did in fact handle the pre-suit negotiations to the point where he made the final decision regarding the employment matters related to the petitioners' claims of discrimination.

F. History of the Litigation

HERMAN commenced the within action against BLOCKBUSTER in the United States District Court, Southern District of New York, and, thereafter, the district court, per the Honorable Sonia Sotomayor, U.S.D.J., ordered limited discovery to proceed solely to ascertain whether BLOCKBUSTER and DZ

constituted an integrated enterprise, and, on November 21, 1997, granted BLOCKBUSTER leave to file a motion for summary judgment on that issue alone. [A143]

On May 22, 1998, the district court action was reassigned to the Honorable Mary J. Lowe, U.S.D.J. [A2] The United States District Judge granted BLOCKBUSTER's motion for summary judgment on all claims and dismissed the complaint in its entirety in an Opinion and Decision, dated August 25, 1998, and entered on the 28th day of August, 1998. [A2]. Thereafter, on appeal, the district court's decision was affirmed by the Second Circuit Court of Appeals. (a1)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' NARROW APPLICATION OF THE INTEGRATED ENTERPRISE DOCTRINE S E R I O U S L Y UNDERMINES THE PROTECTION AFFORDED TO EMPLOYEES BY TITLE VII

a. The Court of Appeals Ignored the Proper Scope of Review on a Motion for Summary Judgment by Drawing All Inferences Against Petitioners

The integrated enterprise doctrine is reserved for the exceptional case where the targeted entity exercises control of a purported separate entity that exceeds the control normally exercised by one entity over an affiliated entity.

The record, as it stands, is replete with indicia that BLOCKBUSTER held a controlling interest of DZ, had common ownership with DZ; had common management with DZ, and maintained financial control over DZ all pursuant to a contract executed by BLOCKBUSTER and DZ, and therefore, they are an integrated enterprise for purposes of the within action.

The rude core of BLOCKBUSTER's position is that BLOCKBUSTER did not own DZ at the time of the occurrence

of the within violations and even though BLOCKBUSTER had the power of hiring, promoting, demoting, discharging and transferring employees of DZ, by virtue of the MSA, BLOCKBUSTER did not exercise these powers. Therefore, BLOCKBUSTER was not an integrated enterprise with DZ.

In order to justify the application of the integrated enterprise doctrine, employees must have had a reasonable belief that the targeted entity, in this case, BLOCKBUSTER, had control over their employment status. In addition to the aforementioned contract, the behavior on the part of BLOCKBUSTER as discussed below, evince that petitioners have met their burden of demonstrating an issue of fact as to whether a reasonable jury could have found under the facts presented herein that DZ and BLOCKBUSTER were an integrated enterprise for purpose of Title VII.

Under Title VII, two entities may be considered an integrated enterprise if there is sufficient evidence of (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and, (4) common ownership or financial control. The four-part test, however, does not provide a template which can be overlaid on fact patterns delineating the interrelationship between two entities to provide clear and consistent guidelines for determining whether an integrated enterprise exists under the Title VII regime. *See Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995), *citing Garcia v. Elf Atochem North America,* 28 F.3d 446, 450 (5th Cir. 1994); *Armbruster v. Quinn,* 711 F.2d 1332, 1337 (6th Cir. 1983); and, *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977).

Instead, all factors must be considered together from a common-sense perspective; this totality approach indicates a wide-ranging set of circumstances may be weighed in an integrated enterprise analysis. This Court should reject any intimation that there is a requirement of bright-line elements to be presented to establish an integrated enterprise.

Viewing the totality of the circumstances herein, HERMAN has at a minimum made a prima facie showing that

BLOCKBUSTER and DZ constitute an integrated enterprise.

The lower court erred by drawing all inferences against the non-moving party on the within summary judgment motion, and, by arrogating credibility issues from the province of the jury. Further, the lower court erred by holding that BLOCKBUSTER may not, as a matter of law, be held responsible for the acts of DZ, where BLOCKBUSTER had been contractually obligated to manage the day-to-day operation and held the power to hire, fire, demote and terminate the employees of DZ, and in fact had the power to do so.

b. Numerous Material Issues of Fact Exist

As shown by the exhibits contained in the joint appendix, numerous material issues of fact are in dispute. [A426] BLOCKBUSTER's motion for summary judgment, therefore, should have been denied.

The lower court disregarded the well-established principle stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513-1514, 91 L.Ed.2d 202 (1986), that all inferences are to be drawn in favor of the non-moving party in a motion for summary judgment, while at the same time inconsistently acknowledging the existence of a multitude of factual matters required for the proper application of the integrated enterprise test.

In the instant case, it is clear a reasonable trier of fact could find that the relationship between BLOCKBUSTER and DZ constitute an integrated employer. BLOCKBUSTER argues that they did not exercise sufficient control over DZ to establish single employer status. However, the pleadings, depositions, affidavits and exhibits clearly raise genuine issues of fact concerning whether their relationship falls under the integrated enterprise doctrine. Fed. R. Civ. P. 56(d). Summary judgment was not appropriate in the instant case.

Although correctly noting that on this motion the district court was required to "draw all reasonable inferences in the light most favorable to the non-moving party[]" [A714], the district

court incorrectly (1) determined issues of credibility as to Detz and TAYLOR, by accepting their statements as being true and as being the only possible version of the allocation of power, and thereby effectively negativing the MSA; (2) ignored the party admissions made by defendant submitted in our opposition; and, (3) drew all inferences in the light most favorable to BLOCKBUSTER.

Rivera v. Puerto Rican Home Attendants Services

In *Rivera v. Puerto Rican Home Attendants Services*, 922 F. Supp. 943 (S.D.N.Y. 1996), a management contract was at issue for the purpose of treating two entities as a joint employer for purposes of Title VII. The complaint in that case alleged that entity #1 contracted with and monitored entity # 2, and held itself out as responsible to the public for the wrongdoings of the managing employees of entity # 2. *Id.* at 949.

The district court found that "plaintiffs' allegations would permit proof of control sufficient to bring the City within the definition of 'employer' under the common law agency principles or that would warrant treating the City and PRHAS as joint employers or a single employer." *Id.* The district court noted that the contract left a material dispute over the amount of the City's supervision and control of PRHAS and held that summary judgment as to the status of the relationship between the two entities would have been inappropriate at that stage. *Id.* at 950.

Extraordinary circumstances exist herein triggering the integrated enterprise doctrine in view of the plain language of the MSA.

Moreover, when a contract is susceptible to more than one interpretation, its interpretation is a question of fact to be determined at trial, and may not be determined on summary judgment. *Rothenberg v. Lincoln Farms Camp, Inc.*, 755 F.2d 1017 (2d Cir. 1991).

II. THE EXISTENCE OF SEPARATE CORPORATE STRUCTURES DOES NOT CHANGE THE ESSENTIAL CHARACTER OF THE RELATIONSHIP BETWEEN BLOCKBUSTER AND DZ

a. The Integrated Enterprise Doctrine

The framers of Title VII used the National Labor Relations Act [hereinafter "NLRA"] as its model. *See, e.g.*, 42 U.S.C. § 2000e (referring to the NLRA). The similarity in the language of Title VII and the NLRA is indicative of a willingness to allow the broad construction of the NLRA to provide guidance and determination of whether under Title VII, two companies should be treated as a single employer. *Armbruster v. Quinn,* 711 F.2d 1332, 1336 (6th Cir. 1983)

Exactly what is needed to establish a single integrated relationship does not lend itself to a precise definition. For guidance, the federal courts initially applied a four-factor test formulated by the National Labor Relations Board (hereinafter "NRLB"). The NRLB developed this test in order to analyze the relationship or connection between two independent enterprises with regard to labor disputes. This standard was approved by the United States Supreme Court in *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 13 L. Ed. 784, 85 S. Ct. 876 (1965).

Thereafter, courts extended this analysis to Title VII cases as a means of determining whether two distinct entities may be regarded as a single employer. *See Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995), *citing Garcia v. Elf Atochem North America,* 28 F.3d 446, 450 (5th Cir. 1994); *Armbruster v. Quinn,* 711 F.2d 1332, 1337 (6th Cir. 1983); and, *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977).

As set forth in *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995), a parent and subsidiary may be considered an integrated enterprise if there is sufficient evidence

of (1) interrelation of operations; (2) centralized control of labor relations; (3) common management and (4) common ownership or financial control. *Cook*, 69 F.3d at 1240-41 (citing *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983)). The four-part test, however, does not provide a template which can be overlaid on fact patterns delineating the interrelationship between two entities to provide clear and consistent guidelines for determining whether an integrated enterprise exists in the Title VII regime.

Instead, all factors must be considered together from a common-sense perspective; this totality approach indicates a wide-ranging set of circumstances may be weighed in an integrated enterprise analysis. This Court should reject any intimation that there is a requirement of bright-line elements to be presented to establish an integrated enterprise. In *Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983), which was cited with approval by this Circuit in *Cook, supra*, at 1241, the court noted that "the most important requirement is that there be sufficient indicia of an interrelationship between the immediate corporate employer and the affiliated corporation to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer." The *Armbruster* court held that the employee need only establish a prima facie case of single employer status.

The Second Circuit and the Southern District of New York have analyzed the aforementioned factors using a totality of circumstances standard. "Ultimately, single employer status depends on all the circumstances of the case and is characterized by absence of an 'arm's length relationship found among unintegrated companies.'") *Lihli Fashions Corp. v. N.L.R.B.*, 80 F.3d 743, 747 (2d Cir. 1996)) (citations omitted); *see also Rivera v. Puerto Rican Home Attendants Services, Inc.*, 92 F. Supp. 943, 949 (S.D.N.Y. 1996). Consequently, the presence or absence of any of the factors is not necessarily determinative. Ultimately, the analysis focuses on whether the parent had the authority to make the final decision in connection with employment matters. Again, the polestar for purposes of this appeal must be the MSA, in relation to the behavior on the part of BLOCKBUSTER as

described herein.

1. Interrelation of Operations

The courts have considered the existence and extent of interrelation of operations between two enterprises as one of the four factors in determining whether the entities constitute a single integrated enterprise.

In *Lusk v. Foxmeyer Health Corporation*, 129 F.3d 773 (5th Cir. 1997), the Fifth Circuit listed the relevant factors that it considers when analyzing the interrelations of operations. The factors include involvement in the subsidiary's daily decisions, accounts receivable, inventories and lines of credit. Other indications of an interrelationship include maintenance of the subsidiary's books and financial and payroll records, issuing the subsidiary's paychecks and preparing and filing the subsidiary's tax returns.

In *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), the court found an interrelation of operations where the parent company handled its subsidiary's accounts receivable, its payroll and cash accounting, received financial reports and monitored its sales shipments. *Id.* at 1338.

Similarly, in *E.E.O.C. v. Dolphin Cruise Line, Inc.*, 945 F. Supp. 1550 (S.D. Fla. 1996), the court found an interrelationship between two entities evidenced by the exclusive services which each entity provided for each other. In addition, there was evidence of centralized check writing and the sharing of accounting services. *See also Dortz v. City of New York*, 904 F. Supp. 127, 146 (S.D.N.Y. 1996) (finding interrelationship between two entities evidenced by the organizational structure).

Applying the criteria set forth in the above-cited cases to the instant case, a prima facie showing of an integrated relationship between DZ and BLOCKBUSTER is clearly demonstrated. In the instant matter, the testimony of the CFO for DZ and BLOCKBUSTER, AL Detz, reveals an interrelation of operations between BLOCKBUSTER and DZ. For instance, Detz indicated that DZ was included in BLOCKBUSTER's financial

results because of BLOCKBUSTER's ownership interest. [A536] Detz also discussed how BLOCKBUSTER guaranteed a bridge loan for DZ. [A538, A539] When DZ defaulted on the loan, BLOCKBUSTER had to repay the loan on behalf of DZ. Detz stated that BLOCKBUSTER's guarantee of the loan was, in his mind, "a transfer of assets from BLOCKBUSTER to DZ." [A538]

Detz also revealed that DZ sent copies of SEC financial statements to Viacom and BLOCKBUSTER for legal and compliance purposes. [A635] Detz even commented on certain advertising and marketing activities for DZ that was included among BLOCKBUSTER's involvement with the operations of DZ. [A636]

Furthermore, the plain language of the Management Services Agreement (hereinafter "MSA") between BLOCKBUSTER and DZ categorically evidences BLOCKBUSTER's inextricable interrelationship with DZ. The MSA provides:

Specific services The services to be provided by Blockbuster for the Company under this Agreement shall [3] be the following corporate and local level services. . . .

(iii) General financial, accounting and payroll services, including(A) general accounting (billing/invoicing, accounts payable services, accounts receivables management and collection services and maintenance of general ledgers), (B) cash management and banking services, (C) budget preparation and (D) accounting and financial services associated with the preparation and filing of reports to federal, state and local governmental organizations . . . .

[A220]

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[3]If, as Learned Hand put it, "it were proved by twenty bishops that either party, when he used the words, intended something else other than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of this sort." Hotchkiss v. National City Bank, 200 F. 287, 293, (S.D.N.Y. 1911), aff'd, 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50 (1913).

Unequivocally, the actual terms and conditions of the MSA illuminate the extraordinary interrelationship that existed between BLOCKBUSTER and DZ. With Detz's testimony, it is conclusive that an interrelationship between DZ and BLOCKBUSTER was established sufficiently to infer an integration of enterprises. Not only have petitioners set forth enough evidence to deny summary judgment, the evidence indicates that there was in fact an extraordinary interrelationship of operations.

2. Centralized Control of Labor Relations

In *Cook v. Arrowsmith*, 69 F.3d 1235 (2d Cir. 1995), the Second Circuit indicated that one of the more important factors considered in determining whether there is an integrated enterprise is centralized control of labor relations. In *Cook*, the Court concluded that a parent may be considered an employer, if there is a "'showing that there is an amount of participation [that] is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions." Id. at 1241 (citing *Armbruster v. Quinn*, 711 F.2d 1332, 1338 (6th Cir. 1983)). Thus, for Title VII purposes, it is not essential for the parent to have total control or ultimate authority over labor relations.

Although BLOCKBUSTER asserts that there was no participation on any level by employees of BLOCKBUSTER as to DZ personnel, that assertion is belied by, *inter alia*, the language of the MSA or the testimony of Albert Detz and TAYLOR.

In the instant case, it is clear that BLOCKBUSTER had centralized control over the essential elements of labor relations at DZ. Detz testified that he retained, recruited and transferred employees from BLOCKBUSTER to work for DZ. "[W]e transferred a certain number of people from within Blockbuster organizations to go to work for the financial organization." [A529, A530] His testimony indicates that the hiring power at DZ ultimately rested with the CEO and CFO of BLOCKBUSTER.

BLOCKBUSTER insists that the Human Resources at DZ made the final decision with regard to employees. However, pursuant to the MSA, all personnel decisions were to be made by BLOCKBUSTER.

Further, Detz confirmed that BLOCKBUSTER was responsible for employees of DZ even at the local level, including the Fun Centers. Detz stated that "some of the specific services that would be performed for that local level unit would be preparation of a payroll for employees at a local level Fun Center." [A539, A560] Detz added that any unit of DZ other than the corporate headquarters was considered the local level.

BLOCKBUSTER further contends that they did not have control over labor relations because Berrard and Detz did not actually terminate the petitioners. However, it is unrealistic to insist that the CEO or CFO would discharge a low level employee. BLOCKBUSTER's reasoning would lead the fact finder to believe that Berrard and Detz would discharge an employee in one of BLOCKBUSTER's local video stores. That position is untenable.

Further, there is no authority for BLOCKBUSTER's contention that the hiring or termination of a low level employee is a *sine qua non* to demonstrate control over the employee. On the contrary, the Second Circuit stresses that it is the amount of participation of the parent that is indicative even absent control or ultimate authority over hiring and firing. *Cook v. Arrowsmith*, 69 F.3d at 1241.

Common control of labor relations is exemplified by the "MSA" and the testimony of Detz. BLOCKBUSTER's participation was more than "sufficient and necessary to the total employment process." The evidence adduced herein, collectively, is strong evidence of common labor relations.

3. Common Management

The existence of common management has been considered by the federal courts in determining whether the entities were a "single employer" as applied in Title VII cases.

In the instant matter, the evidence is undisputed that at the time of the alleged discrimination, Steve Berrard and Albert Detz were the CEO and CFO of BLOCKBUSTER and DZ, respectively.

Detz explained in his deposition their dual roles in detail. He explained that Berrard's role was to primarily recruit new people in order to replace the old management team:

> Steve took care of the operational and marketing roles bringing those people on board to form the new Discovery Zone management team so through that team, reporting to Steve Berrard as the CEO, that management team of Discovery Zone provided the overall coordination, supervision and directed the day to day activities of Discovery Zone.

[A544-546]

Notably, Berrard and Detz were not only common officers of BLOCKBUSTER and DZ, but both possessed the element of authority, as officers of BLOCKBUSTER, to manage DZ at the lowest level. The MSA provides at Section 1(a) the following:

> General Duties. Blockbuster shall provide the overall coordination and supervision of the business of the Company and its subsidiaries and shall direct and manage the day-to-day operations and business affairs of the Company and its subsidiaries. Blockbuster shall follow the policies and directives of the Board of Directors of the Company and shall observe the same fiduciary duties of care and loyalty to the Company and its stockholders as would be imposed upon an officer or officers of the Company.

[A178-179]

In *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993),

the court explained that the common management prong would be satisfied if there was some nexus between the parent to the subsidiary's employment decisions. Likewise, in the instant case, Berrard and Detz unequivocally had the authority to make and implement employment decisions at DZ. *See also Mckenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930 (8th Cir. 1987) (finding common management where the common president of both corporations had controlled personnel management in both corporations). Consequently, the extraordinary circumstances in the instant case warrant a finding of common management.

4. Common Ownership or Financial Control

The courts have recognized that the existence of common ownership and financial relations as another factor considered to justify treating a parent and its subsidiary as a single employer.

BLOCKBUSTER insists that they had no financial relationship with DZ. Contrary to BLOCKBUSTER's assertions, BLOCKBUSTER owned 49.9 percent of DZ. Further, Detz acknowledged BLOCKBUSTER having an ownership interest in DZ as well as a financial relationship. Detz stated that "there was a relationship between the finances of the two companies." [A535] Detz also mentioned that DZ's financial results were included in BLOCKBUSTER's financial results because of BLOCKBUSTER's ownership interest.

Other evidence of financial relations between the two entities concerned BLOCKBUSTER's guarantee of a bridge loan that was extended to Discovery Zone as well as the copies of SEC financial statements sent to Viacom and to Blockbuster. [A635]

The integrated enterprise analysis in the reported circuit course cases ultimately focus on the question of whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation. *See, e.g., Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir. 1995). The record as it stands certainly gives rise to an inference that BLOCKBUSTER could have, and should have, prevented the victimization that occurred at the local level DZ, and likewise,

could have employed an anti-harassment policy to prevent similar victimization in the future.

Indeed, the MSA empowered BLOCKBUSTER to accomplish that goal; instead, BLOCKBUSTER opted for inertia and now attempts to evade responsibility by denying the existence of their ties with DZ and denying that the contract entered into between them DZ was ever meant to be enforced.[4]

Moreover, the determination of single employer status is a question of fact. *Lihli Fashions Corp., Inc. v. N.L.R.B.*, 80 F.3d 743, 744 (2d Cir. 1996).

b. The Right to Control

Amanare v. Merril Lynch, Pierce, Fenner & Smith, 611 F. Supp. 344 (S.D.N.Y. 1984), *aff'd*, 770 F.2d 157 (2d Cir. 1985), holds that the protection of the civil rights laws extends to the individuals who do not necessarily "stand in direct employment relationship with the employer." BLOCKBUSTER held the power to prevent the complained of acts herein and had the obligation to prevent the egregious acts complained of herein. Even if BLOCKBUSTER can show that they did not stand in direct employment relation with HERMAN, based on the circumstances set forth herein, they must not be permitted to escape culpability.

The behavior perpetrated by DZ and BLOCKBUSTER as demonstrated in this case, is unacceptable in our society, and unless BLOCKBUSTER is found accountable, (because DZ is protected by bankruptcy laws), if left unheard, this case will contribute to thwarting the progress heretofore made in the workplace and society in general. The seriousness of these claims transcends the legal-fiction subterfuge that BLOCKBUSTER attempts to employ.

The DZ bankruptcy has left petitioners with no meaningful recourse. This Court stated in *Chambers v. Baltimore*

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[4] The EEOC investigation determined that DZ's anti-harassment policy was not effective. [A487]

& O.R.R., 207 U.S. 142, 148 (1907), that "[t]he right to sue and defend in the courts is the alternative to force." Petitioners must be given their day in court.

III. UNDER NEW YORK LAW, BLOCKBUSTER's RELATIONSHIP WITH DZ CONSTITUTES A PARTNERSHIP RENDERING BOTH ENTITIES JOINTLY AND SEVERALLY LIABLE FOR VIOLATIONS OF TITLE VII AND THE EXECUTIVE LAW

For purposes of the Partnership Law, a partnership is an association of two or more persons to carry on as co-owners, a business for profit. N.Y. Partnership L. §10(1)(McKinney's 1998). BLOCKBUSTER cannot gainsay that they have not profited, or had profit as their goal, when their association was designed. A partnership also has been said to be a contract of two or more persons to place their money, effects, labor, skill, or some or all of these, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions. *Pattison v. Blanchard*, 5 N.Y. 186 (1851); *Graziani v. Rohan*, 195 N.Y.S.2d 156 (Sup. Ct. N.Y. Cty. 1959), *rev'd on other grounds*, (1st Dept.) 10 A.D.2d 154, 198 N.Y.S.2d 383, *aff'd*, 8 N.Y.2d 967, 204 N.Y.S.2d 346 (1960). The term "persons" includes individuals and corporations. *See* N.Y. Partnership L. § 2 (McKinney's 1998); and N.Y. Business Corporations L. § 202 (McKinney's 1998).

Although frequently referred to as a contract, a partnership is, strictly speaking, the result of a contract, a relation or status, dependent upon the personality of its members. *Bulkley v. O'Donnell*, 148 Misc. 186, 265 N.Y.S. 495, *aff'd*, 240 App. Div. 929, 267 N.Y.S. 983 (1933); *Ruzicka's v. Rager*, 277 App. Div. 359, 100 N.Y.S.2d 159 (1950). The partnership contract may be created orally, in writing or, as in this instance, by implication. The ultimate inquiry is whether the parties have so joined their property interests, skills and risks, that their respective contributions have become as one, and the co-mingled properties

and interests of the parties have been thereby subject to each of the partners on the trust and inducement that each would act for their joint benefit. *See, e.g., Hanlon v. Melfi*, 102 Misc.2d 170, 423 N.Y.S.2d 132 (S. Ct. Suffolk Cty. 1979).

The New York State Court of Appeals' decision in *Royal Bank and Trust Co. v. Weintraub, Gold and Alper*, 68 N.Y.2d 124, 506 N.Y.S.2d 151 (1986), is instructive. In *Royal Bank*, the Court held that where a law firm's space, telephone number, telephone book iisting, and stationary continued in use by the individuals, the partnership was liable to the party reasonably relying on the impression of an ongoing entity. The Court held that despite a private agreement to dissolve a partnership, partners who continue to carry on business in the firm name with no manifestation of their dissolution, are estopped from denying liability to a party relying on the public indicia of partnership for a tort committed by a partner acting with apparent authority.

Factors to be considered in determining whether a partnership exists are parties' intent (expressed or implied), whether there was joint control and management of business, whether there was sharing of profits and losses, and whether there was combination of property, skill, or knowledge. *Robinson v Jewish Hosp. & Medical Ctr.*, 221 A.D.2d 328, 633 N.Y.S.2d 1010 (2d Dept. 1995), *summary judgment den.*,221 A.D.2d 328, 633 N.Y.S.2d 792 (2d Dept.). The MSA sets forth in no uncertain terms that the requirements for a partnership are fulfilled herein.

Therefore, in view of the aforementioned, BLOCKBUSTER cannot deny that an issue of fact exists as to whether their relationship with DZ at the time of the within violations constituted a partnership as a matter of law.

As set forth above, after viewing the evidence presented herein HERMAN has established that an issue of fact exists as to whether DZ and BLOCKBUSTER constitute an integrated enterprise. The lower courts erred in determining that a reasonable jury could not find, after viewing the totality of the circumstances herein, that DZ and BLOCKBUSTER constituted an integrated enterprise. Petitioners respectfully submit that all factual inferences in the record weigh in favor of HERMAN, the non-moving party; therefore, summary judgment was inappropriate.

IV. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
August 28, 1999

Respectfully submitted,

CHEVEN, KEELY & HATZIS, ESQS.
Attorneys for Petitioners

BY: _____
Joseph D. Nohavicka (JN2758)

APPENDIX A

1999 U.S. App. LEXIS 11976, *

ADAM HERMAN, DIONNE DUROSARO-KELSON, MICHELLE FITZPATRICK, SHAWN DAVILA, KELLEE ANTHONY, KENYA NEWELL, PAULETTE RUIZ, LASHAWNDA BONNER, ASHIREA MOORE, FANNIE SMITH,

Plaintiffs-Appellants,

v.

BLOCKBUSTER ENTERTAINMENT GROUP and VIACOM INTERNATIONAL, INC.,

Defendants-Appellees.

98-9301

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

1999 U.S. App. LEXIS 11976

June 4, 1999, Decided

NOTICE: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York (Mary Johnson Lowe, J.).

DISPOSITION: AFFIRMED.

CORE TERMS: integrated, discovery, personnel, labor relations, four-factor, female, entities, summary judgment, centralized, processing.

COUNSEL: Appearing for Appellant: JOSEPH D. NOHAVICKA, Cheven Keely & Hatzis, New York, NY.

Appearing for Appellee: JEFFREY I. PASEK, Cozen and O'Connor, Philadelphia, PA.

JUDGES: PRESENT: HON. ELLSWORTH A. VAN GRAAFEILAND, HON. GUIDO CALABRESI, HON. CHESTER J. STRAUB, Circuit Judges.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

The plaintiffs are nine women and one man who were employed in 1995 by Discovery Zone, a corporation that subsequently declared bankruptcy. The female plaintiffs allege that they were harassed on the basis of sex, and in some instances race, by management personnel at Discovery Zone. The male plaintiff claims that he was constructively discharged for reporting and attempting to pursue the complaints of his female co-plaintiffs. But the plaintiffs do not bring the present suit against [*2] Discovery Zone. Instead, they have sued Blockbuster Entertainment Group, a 49.9% owner of Discovery Zone, and Blockbuster's parent corporation, Viacom International, Inc. (collectively "Blockbuster"). Plaintiffs' theory was that Blockbuster and Discovery Zone were sufficiently integrated to be considered a "single employer" for purposes of a suit brought

under 42 U.S.C. § 2000e et seq. ("Title VII").[5] The United States District Court for the Southern District of New York (Lowe, J.) disagreed, holding that the two entities were not a single employer and granting summary judgment for Blockbuster. *See Herman v. Blockbuster Entertainment Group*, 18 F. Supp. 2d 304 (S.D.N.Y. 1998). We affirm.

BACKGROUND

The relationship between Blockbuster and Discovery Zone is somewhat more extensive than indicated [*3] by the fact that the former owns 49.9% of the latter. On April 17, 1995, Blockbuster entered into a Management Services Agreement with Discovery Zone. Under this contract, Blockbuster was to manage certain of Discovery Zone's operations and Discovery Zone was to pay Blockbuster on a quarterly basis for the services rendered. In June 1995, the CEO and CFO of Blockbuster began serving as CEO and CFO of Discovery Zone. According to the deposition testimony of these officers, the management services that Blockbuster actually provided for Discovery Zone were limited to the areas of payroll processing, tax preparation, insurance processing, computer work, and some legal services. In addition, Blockbuster made what is described as a one-time transfer of several dozen financial accounting personnel to Discovery Zone. Despite all this, and after staying Blockbuster's motion for dismissal under 12(b)(6) and ordering limited discovery to determine whether Discovery Zone and Blockbuster were sufficiently integrated to be considered a single employer, the district court ruled that Blockbuster and Discovery Zone were not so integrated and granted summary judgment for the defendants. *See Herman*, [*4] 18 F. Supp. 2d at 314.

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[5]Plaintiffs also asserted that Blockbuster could be held liable for Discovery Zone's actions on a partnership theory. We reject that contention for substantially the reasons stated by the district court.

DISCUSSION

Whether two related entities are sufficiently integrated to be a "single employer" for Title VII purposes is determined by reference to a four-factor test derived from cases involving the National Labor Relations Act: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995) (internal quotation marks omitted). In Title VII cases, we focus on the second factor. See *id.*

Most operations of Blockbuster and Discovery Zone were distinct. They shared no office space, and they maintained separate bank accounts. Discovery Zone had its own labor relations department, and the plaintiffs introduced no evidence suggesting that any Blockbuster employee actually hired, promoted, fired, or directed Discovery Zone's personnel. The two corporations did share two senior officers, but most of Discovery Zone's managers were affiliated only with Discovery Zone. And finally, although Blockbuster's share of ownership in Discovery Zone was certainly significant, Blockbuster remained a minority stockholder. [*5] After examining these four factors, we conclude that the facts before us do not justify a finding that Blockbuster and Discovery Zone were a single employer.

Blockbuster and Discovery Zone were also parties to a Management Services Agreement. And we do not hold that such a contract could never be evidence of common management or centralized control of labor relations for purposes of the four-factor test. At oral argument, however, the plaintiffs conceded that, standing alone, the particular Management Services Agreement between Blockbuster and Discovery Zone did not raise a genuine issue of fact as to whether Blockbuster and Discovery Zone were a single employer. Moreover, the plaintiffs adduced no evidence of actions under the arrangement that made Blockbuster and Discovery Zone one employer. Accordingly, the

instant case does not present the question of when, if ever, a contract under which one corporation agrees to provide management services for another can, either alone or in conjunction with other evidence, enable a single-employer claim to survive summary judgment.

The judgment of the district court is affirmed.

APPENDIX B

18 F. Supp. 2d 304, *; 1998 U.S. Dist. LEXIS 13291, **

ADAM HERMAN, DIONNE DUROSARO-KELSON, MICHELLE FITZPATRICK, SHAWN DAVILA, KELLEE ANTHONY, KENYA NEWELL, PAULETTE RUIZ, LASHAWNDA BONNER, ASHIREA MOORE, and FANNIE SMITH,

Plaintiffs,

-against-

BLOCKBUSTER ENTERTAINMENT GROUP and VIACOM INTERNATIONAL, INC.,

Defendants.

No. 97 Civ. 1562 (MJL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

18 F. Supp. 2d 304; 1998 U.S. Dist. LEXIS 13291

August 25, 1998, Decided August 27, 1998, Filed

DISPOSITION: [**1] Summary judgment granted in favor of Defendants.

CORE TERMS: subsidiary, entity, discovery, labor relations, accounting, personnel, interrelated, interrelation, payroll, hired, zone, centralized, integrated, summary judgment, partnership, discriminatory conduct, human resources, hiring, discriminatory, preparation,New York Human Rights Law, exercised control, common ownership, interrelationship, advertising, transferred, handled, played, sexual harassment, processing

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Jeffrey I. Pasek, Esq., Anita B. Weinstein, Esq., COZEN AND O'CONNOR, Philadelphia, Pennsylvania, for Defendants.

JUDGES: Mary Johnson Lowe, United States District Judge.

OPINION BY: Mary Johnson Lowe

OPINION: [*306] OPINION AND ORDER

MARY JOHNSON LOWE, U.S.D.J.

Before the Court is the motion for summary judgment of Defendants Blockbuster Entertainment Group ("Blockbuster") and Viacom International, Inc. ("Viacom") (collectively the "Defendants") pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, the Court hereby grants summary judgment in favor of Defendants.

BACKGROUND

Plaintiffs Adam Herman, Dionne Durosaro-Kelson, Michelle Fitzpatrick, Shawn Davila, Kellee Anthony, Kenya Newell, Paulette Ruiz, Lashawnda Bonner, Ashirea Moore, and Fannie Smith ("Plaintiffs") commenced this action alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the New York Human Rights Law § 290, et seq. Plaintiffs are all former employees of Discovery Zone,[1] a chain of children's [**2] indoor recreational facilities with approximately 300 outlets in the United States and Europe. Blockbuster owns

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[1]At the time Plaintiffs commenced this action, Discovery Zone was in bankruptcy proceedings. Plaintiffs subsequently filed a separate action against Discovery Zone.

49.9 percent of Discovery Zone's common stock. As of September 29, 1994, Blockbuster is a wholly-owned subsidiary of Viacom.

In June 1997, Defendants sought leave to move to dismiss this action, claiming they could not be held liable as Plaintiffs, "employers" under either Title VII or the New York Human Rights Law. The Court, finding discovery on this issue necessary, denied Defendants' request and ordered discovery on the limited issue of whether the management and operations at Blockbuster and Discovery Zone were sufficiently integrated to hold Blockbuster liable under Title VII for the alleged discriminatory acts at Discovery Zone's stores. After the parties completed this limited discovery, Defendants filed the instant motion on the [**3] integrated enterprise issue.

[*307] Plaintiffs, one male and nine females, were all hired by Discovery Zone between December 1994 and August 1995. Each worked at a New York area Discovery Zone location. The nine female plaintiffs allege that, during their employment in 1995, they each were subjected to sexual harassment and discrimination by male general managers at Discovery Zone. In July 1995, several of the plaintiffs reported the incidents to plaintiff Adam Herman ("Herman"), an assistant manager at Discovery Zone's Manhattan location. Herman allegedly reported these complaints to Laurie Fleurent ("Fleurent"), the director of Discovery Zone's Human Resources department. Herman claims that, at a subsequent meeting with various Discovery Zone management on August 11, 1995, he was effectively told to remain quiet if he wished to advance within the company. Herman resigned soon after the meeting. Herman and several other plaintiffs allege that they were constructively discharged in retaliation for reporting the discriminatory conduct.

On April 17, 1995, Viacom and Blockbuster entered into a Management Services Agreement ("MSA") with Discovery Zone whereby Blockbuster agreed to provide various [**4] management services to Discovery Zone. See Weinstein Aff., Ex.

5 (MSA). The MSA provides that "Blockbuster should take over the operational and administrative functions of [Discovery Zone] by providing certain management services for [Discovery Zone]." See *id.* at 1. The MSA further provides that "Blockbuster shall provide the overall coordination and supervision of the business of [Discovery Zone] and its subsidiaries and shall direct and manage the day-to-day operations and business affairs of [Discovery Zone] and its subsidiaries." See *id.*

The MSA lists specific services to be provided to Discovery Zone, including:

> (iii) General financial, accounting and payroll services, including (A) general accounting (billing/invoicing, accounts payable services, accounts receivables management and collection services and maintenance of general ledgers), (B) cash management and banking services, (C) budget preparation and (D) accounting and financial services associated with the preparation and filing of reports to federal, state and local governmental organizations, including those associated with the preparation and filing of reports to the United States Securities [**5] and Exchange Commission (the "SEC"); . . .
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> (vi) legal and tax services, including . . . (B) the preparation and filing of, and assistance with respect to, tax returns and reports to the SEC and other governmental agencies . . . and (D) the management of the defense or prosecution of litigation, and of other legal services furnished by outside counsel, and making recommendations with respect thereto; . .

> (xi) human resource and personnel administration services, including (A) employee and labor relations, (B) compensation and benefits, (C) hiring, promoting, demoting, discharging and transferring employees and (D) providing incentive and severance packages to employees . . .

See *id.* at 2-3. Discovery Zone was to "reimburse Blockbuster for the costs and expenses incurred in its provision of management service to [Discovery Zone]." See *id.* at 1; see also *id.* at 5-6 ("Compensation for Services").

During the limited discovery period, Plaintiffs deposed Al Detz ("Detz"), the former Chief Financial Officer of Blockbuster, and Johnny Taylor ("Taylor"), former in-house counsel at Blockbuster. Detz testified that Blockbuster provided certain services to Discovery [**6] Zone under the MSA as a cost-cutting measure. See Detz Tr. at 26. For each service contemplated under the MSA, Discovery Zone performed a cost analysis to determine if Blockbuster could provide the service cheaper. See *id.* at 26, 96-97. Pursuant to the MSA, Blockbuster actually provided the following services to Discovery Zone: payroll processing, tax return preparation, insurance claim processing, computer operation work, and certain legal services. See *id.* at 25-26, 33-34.

In addition to the services provided, Detz served as interim CFO at Discovery Zone from June 1995 until the Spring of 1996. See *id.* at 54-55. Steve Berrard, the Chief Executive Officer of Blockbuster, served as interim CEO at Discovery Zone during the same period. See *id.* Blockbuster also transferred [*308] approximately 30-70 financial accounting personnel to Discovery Zone after the MSA was signed. See *id.* at 15-16.

DISCUSSION

I. Legal Standards Under Rule 56

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and [**7] that the moving party is entitled to a judgment as a matter of law." [2] Fed. R. Civ. P. 56(c). Furthermore, Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The non-moving party, however, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citation omitted). Rather, to defeat a motion for summary judgment, the opposing party must produce "concrete evidence from which a reasonable juror could return a verdict in [its] favor." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

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[2]Local Civil Rule 56.1 requires a party moving for summary judgment to annex a statement of material facts to which the party contends there is no genuine issue to be tried. See S.D.N.Y. Local Civ. R. 56.1(a). In support of their motion, Defendants submitted a Rule 56.1 Statement that merely states a few legal conclusions. Defendants also annexed a document entitled "Motion for Summary Judgment" in which they aver facts which they contend are not in dispute. It appears as though Defendants equate their document entitled "Motion for Summary Judgment" with the Local Rule 56.1(a) requirement, and the Court will treat it as such. The Court also notes that Plaintiffs treated Defendants' "Motion for Summary Judgment" as a Rule 56.1 Statement and responded to it in compliance with Local Rule 56.1(b). See Pls.' "Response to Defendants-Movant's Motion for Summary Judgment", at 1 n.1.

247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). In making this determination, the Court draws all reasonable inferences in the light most [**8] favorable to the non-moving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962).

II. Blockbuster's Status as Employer Under Title VII

Title VII prohibits discriminatory employment practices by "employers" as defined in 42 U.S.C.§ 2000e.[3] It is undisputed that Plaintiffs were all employed by Discovery Zone. Thus, for Plaintiffs' claims to survive, they must establish that Blockbuster and Discovery Zone constituted a single employer for purposes of Title VII protection.

As a general matter, "a corporate entity is liable for the acts of a separate, related entity only under extraordinary circumstances." *Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996) (citing *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 & n.2 (10th Cir. 1993)). Similarly, "the law only treats the employees of a corporate entity as the employees of a related entity under extraordinary circumstances." *Id.* (citing *Frank*, 3 F.3d at 1362); [**10] see also *Balut v. Loral Electronic Systems*, 988 F. Supp. 339, 344 (S.D.N.Y. 1997). Thus, "the most important requirement is that there be sufficient indicia of an interrelationship between the immediate corporate employer and the affiliated corporation to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer." *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983).

A. The Four-Part Single Employer Liability Test

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[3]The statute defines "employer" as "a person engaged in an industry affecting commerce, who has fifteen or more employees for each working day." 42 U.S.C. §2000e(b).

In *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 13 L. Ed. 2d 789, 85 S. Ct. 876 (1965) (per curiam), the Supreme Court approved a four-part [*309] test established by the National Labor Relations Board for determining whether two entities constitute a single entity in the context of labor disputes. The Second Circuit, following the trend of the Fifth, Sixth, and Eighth Circuits, has adopted the four-part test for determining when two entities are sufficiently interrelated for an employee to hold both entities liable under Title VII. See *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 (2d [**11] Cir. 1995). Under this test, "'[a] parent and subsidiary cannot be found to represent a single, integrated enterprise in the absence of evidence of (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.'" *Cook*, 69 F.3d at 1240 (quoting *Garcia v. Elf Atochem North America*, 28 F.3d 446, 450 (5th Cir. 1994)).

In assessing these factors in Title VII actions, courts should focus their analysis on the second factor: centralized control of labor relations. See *Cook*, 69 F.3d at 1241 (citing *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983)); see also *Armbruster*, 711 F.2d at 1336. The critical question to be answered is: "'What entity made the final decisions regarding employment matters related to the person claiming discrimination?'" *Cook*, 69 F.3d at 1240 (quoting *Trevino*, 701 F.2d at 404); see also *Frank*, 3 F.3d at 1362. Thus, the Court will assess each of the four factors in turn, with particular focus on the second factor.

1. The Interrelation of Operations

The Fifth Circuit recently set forth various criteria for determining whether a sufficient [**12] interrelation of operations exists: (1) whether the parent was involved directly in the subsidiary's daily decisions relating to production, distribution, marketing, and advertising; (2) whether the two entities shared employees, services, records, and equipment; (3) whether the entities

commingled bank accounts, accounts receivable, inventories, and credit lines; (4) whether the parent maintained the subsidiary's books; (5) whether the parent issued the subsidiary's paychecks; and (6) whether the parent prepared and filed the subsidiary's tax returns. See *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997); see also *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 981-82 (4th Cir. 1987) (examining similar factors to those in Lusk). In assessing whether the parent might "so dominate the subsidiary's operations," the Johnson court stated that "the subsidiary might be highly integrated with the parent's business operations, as evidenced by the commingling of funds and assets, the use of the same work force and business offices for both corporations, and the severe undercapitalization of the subsidiary." 814 F.2d at 981; see also *Dewey v. PTT Telecom Netherlands*, [**13] U.S., Inc., 1995 U.S. Dist. LEXIS 10028, No. 94 Civ. 5983, 1995 WL 425005, at *3 (S.D.N.Y. July 19, 1995) (stating that "courts look to factors such as common offices, long distance shipping, bank accounts, payroll, and shared facilities rather than to an overlap of personnel as an indicia of integration" under the interrelated operations factor), *aff'd* 101 F.3d 1392 (2d Cir. 1996) (citations omitted).

Blockbuster provided the following limited services to Discovery Zone pursuant to the MSA: payroll processing, insurance claim processing, preparation of tax returns, and computer operation work. See Detz Tr. at 25-26. In addition, after the MSA was signed, approximately 30-70 financial accounting people transferred from Blockbuster to Discovery Zone. See *id.* at 15-16. Finally, although the assets and liabilities of the two companies were separate, see *Detz* Tr. at 20, Blockbuster guaranteed one bridge loan for Discovery Zone, see *id.* at 24.

The Court finds this limited interrelationship insufficient to support a finding of interrelated operations. Most significant operations at the two corporations were separate and distinct. First, the two entities shared no common office space. Cf. *Duffy [**14] v. Drake Beam Morin, Harcourt General, Inc.*, 1998 U.S.

Dist. LEXIS 7215, 96 Civ. 5606, 1998 WL 252063, at *4 (S.D.N.Y. May 19, 1998) (citing common office space as factor in finding interrelation of operations); *Perry v. Manocherian*, 675 F. Supp. 1417, 1426 (S.D.N.Y. 1987) (finding interrelatedness based, in part, on common headquarters); with *Balut v. Loral Electronic Systems*, 988 F. Supp. 339, 346 (S.D.N.Y. 1997) (finding no [*310] interrelation of operations based, in part, on lack of common office space). In fact, Blockbuster and Discovery Zone were structured by different geographical regions and zones with separate regional offices. See *Taylor* Tr. at 47-48; Detz Tr. at 128-29. Second, the two entities maintained separate bank accounts and separate payroll accounts. See *Detz* Tr. at 125. Discovery Zone also handled its own cash management and accounts payable invoices. See *Detz* Tr. at 99-100, 120-21. Third, Discovery Zone prepared its own financial statements,[4] budgets and forecasts, and maintained its own accounting records. See *Detz* Tr. at 120-22. In addition, Discovery Zone handled its own advertising and marketing. See *Detz* Tr. at 122-23; cf. *Perry*, 675 F. Supp. at 1426 (noting [**15] interrelated advertising of two entities).

Nor does the one-time transfer of employees from Blockbuster to Discovery Zone support a finding of integrated operations. *Detz* testified that after the transfer, the employees were entirely dedicated to Discovery Zone and no longer affiliated with Blockbuster. See *Detz* Tr. at 126. There is no evidence that employees otherwise rotated between the two companies. Cf. *Regan v. In the Heat of the Nite, Inc.*, 1995 U.S. Dist. LEXIS 9682, 93 Civ. 862, 1995 WL 413249, at *3 (S.D.N.Y. July 12, 1995) (finding interrelated operations where employees at related establishments rotated informally among the establishments and

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[4]Blockbuster did include Discovery Zone's financial statements with its own financial statements. See Detz Tr. at 20-21. However, accounting requirements mandated such treatment based upon the extent of Blockbuster's ownership interest. See *id.* at 21. This does not support a finding of integrated operations.

employee records for all establishments maintained at same headquarters); [**16] *Perry*, 675 F. Supp. at 1426 (finding interrelation where "employees who were in theory hired to work for one of the entities have in practice been used to do work for the other."); with *Balut*, 988 F. Supp. at 346 (finding no [5]interrelation where employees were transferred among subsidiaries annually, but not on a day-to-day basis).

Although Plaintiffs point to the language of the MSA to establish Blockbuster's theoretical control over Discovery Zone's operations, Plaintiffs put forth no evidence to contradict Detz's testimony that most operations remained separate and distinct in practice. Moreover, Discovery Zone paid for the limited services that Blockbuster provided under the MSA in the same manner as if Discovery Zone had hired an outside accounting service. See *Weinstein* Aff., Ex. 5 (MSA) at 10 (Discovery Zone retained Blockbuster "to act solely as management service provider" and "in such capacity, Blockbuster shall act as an independent contractor."). Blockbuster billed Discovery Zone for each service provided. See *Detz* Tr. at 22-23. Thus, the two companies did not share those limited services as if operating as one entity.

Plaintiffs rely on *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), and *E.E.O.C. v. Dolphin Cruise Line, Inc.*, 945 F. Supp. 1550 (S.D. Fla. 1996), to support a finding of interrelated operations. Both cases, however, present substantially greater facts evidencing such an interrelationship. Armbruster, unlike our case, involved a parent company and its wholly-owned subsidiary. 711 F.2d at 1338. In addition to handling the subsidiary's payroll accounting and receiving periodic financial reports from the

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[5]At times Discovery Zone consulted counsel from Blockbuster's legal department under this same billing method pursuant to the MSA. See Detz Tr. at 33. Each company, however, maintained its own legal department at separate locations. See *Taylor* Tr. at 13; cf. *Kelber v. Forest Elec. Corp.*, 799 F. Supp. 326, 331 n.4 (S.D.N.Y. 1992) (finding insufficient interrelations between related companies despite evidence that the two companies shared a legal department).

subsidiary, the parent in Armbruster handled the subsidiary's cash accounting and accounts receivable, provided administrative backup, monitored all of the subsidiary's sales shipments, negotiated and closed the purchase of the subsidiary's office building, and approved the subsidiary's office remodeling. See *id.* Moreover, the subsidiary's bank accounts were located at the parent's headquarters, and the subsidiary's management used the parent's credit cards and corporate aircraft. See *id.*

[*311] In Dolphin Cruise, the two related companies shared offices, used logos and letterhead interchangeably, advertised jointly, issued checks on each other's behalf, shared [**18] accounting services and bank accounts, and maintained personnel and other business records at the same office. See 945 F. Supp. at 1553-54. In addition, one entity prepared the other's tax returns, budgets, and annual statements. See *id.* at 1554. Thus, the findings of interrelated operations in both Armbruster and Dolphin Cruise rested upon substantially greater facts than Plaintiffs present. Although Plaintiffs point to the MSA to suggest that similar operations were shared between Blockbuster and Discovery Zone, Plaintiffs' lack of evidence that such services were actually shared precludes a finding of interrelated operations.

2. Centralized Control of Labor Relations

To establish centralized control over labor relations, Plaintiffs need not demonstrate Blockbuster's total control or ultimate authority over Discovery Zone's hiring decisions. See *Cook*, 69 F.3d at 1241. Rather, control over labor relations may be established "by a showing . . . of participation [that] is sufficient and necessary to the total employment process." Cook, 69 F.3d at 1241 (quoting *Armbruster*, 711 F.2d at 1338). In making this assessment, the Court must focus its inquiry [**19] on the parent's actual involvement in the particular circumstances giving rise to the litigation and determine, "'what entity made the final decisions regarding employment matters related to the person claiming discrimination?'" *Cook*, 69 F.3d at 1240 (quoting

Trevino, 701 F.2d at 404); see also *Frank*, 3 F.3d at 1363; *Balut*, 988 F. Supp. at 344.

In *Cook*, the Second Circuit found the requisite degree of control over labor relations. The parent in Cook reviewed applications for employment at the subsidiary, approved personnel status reports, and approved all major employment decisions for the subsidiary. See *Cook*, 69 F.3d at 1241. Additionally, the plaintiff was hired to work at the subsidiary by the vice-president of Human Resources at the parent and was fired at the direction of an employee of the parent. See *id.*

None of the facts relied upon in *Cook* are present here. To establish centralized control, Plaintiffs once again rely on the language of the MSA.[6] Indeed, under the MSA, Blockbuster agreed to provide "human resource and personnel administration services, including (A) employee and labor relations, (B) compensation and benefits, (C) hiring, [**20] promoting, demoting, discharging and transferring employees and (d) providing incentive and severance packages to employees." Weinstein Aff., Ex. 5 at 3. However, aside from the one-time transfer of employees from Blockbuster to Discovery Zone, Plaintiffs offer little, if any, evidence that Blockbuster actually participated in Discovery Zone's labor relations or employment decisions.

To the contrary, the evidence demonstrates that Blockbuster never provided the human resource and personnel services contemplated in the MSA. First, Discovery Zone had its own human resources department. See *Detz* Tr. at 50-51. Laurie Fleurent, a Discovery Zone employee, was director of Discovery Zone's human resources department and in charge of the day-to-day decisions on

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[6]As for any discriminatory conduct alleged to have occurred before April 17, 1995, the date of the MSA, Plaintiffs offer absolutely no evidence of any interrelationship of operations or centralized control of labor relations between the companies.

Discovery [**21] Zone personnel. See Taylor Tr. at 18. There is no evidence that Fleurent reported to Blockbuster management or otherwise sought Blockbuster's approval for any personnel decisions. Detz testified that "all of the employee and labor relations were handled by Discovery Zone personnel . . . there was no need for Blockbuster to provide that service on behalf of Discovery Zone." Detz Tr. at 50-51; see also *id.* at 98-99. Discovery Zone also had its own hiring policy. See *Detz* Tr. at 47. Finally, although not a significant factor, there is no evidence that Discovery Zone employees participated in the same benefit or pension plans as Blockbuster employees. Thus, as a general matter, Blockbuster did not control or participate in Discovery Zone's labor relations. See *Duffy*, 1998 WL 252063, [*312] at *4 (holding parent not liable for alleged discriminatory conduct of wholly-owned subsidiary where it was uncontroverted that plaintiffs worked for subsidiary and each was supervised by a subsidiary employee, and that subsidiary maintained separate human resources department, established own policies, and made own decisions as to hiring, discipline, and termination of employees).

More significantly, [**22] Plaintiffs offer no evidence that Blockbuster played any role in the employment decisions and alleged discriminatory conduct particularly affecting them. The Amended Complaint alleges that each Plaintiff was hired by Discovery Zone. In fact, three of the Plaintiffs, Paulette Ruiz, Ashirea Moore, and Fannie Smith, were hired directly by Discovery Zone in August 1995, several months after the MSA was signed. Each female plaintiff alleges that she was sexually harassed by a supervisor at her respective Discovery Zone location. The supervisors were all Discovery Zone general managers. In addition, the complaints of harassment were reported to and dealt with by Discovery Zone management. There is no evidence that any Blockbuster employee played a role in handling

the complaints internally.[7] See *Duffy*, 1998 WL 252063, at *5 (finding no centralized control where, despite fact that parent generally required subsidiary "to obtain its approval before making significant changes in operations, there is no evidence that such approval was either sought or obtained with respect to any of [subsidiary's] actions at issue."); *Balut*, 988 F. Supp. at 346 (finding plaintiff failed to demonstrate [**23] that parent company "hired, transferred, reviewed or fired him" despite fact that parent's former president interviewed and hired plaintiff to work at subsidiary, subsidiary notified parent of its employment decisions, and parent assisted plaintiff in locating other employment within company); *Dewey*, 1995 WL 425005, at *2 (finding subsidiary's immediate notification to parent of its hiring and firing decisions insufficient to demonstrate that parent exercised control over subsidiary's employment decisions); cf. *Dortz v. City of New York*, 904 F. Supp. 127, 145 (S.D.N.Y. 1995) (finding centralized control where employees of parent served as

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[7]Plaintiffs' lone allegation of involvement by a Blockbuster employee concerns statements made by Taylor, Blockbuster's in-house counsel, to Plaintiffs' counsel regarding the sexual harassment claims. In short, Plaintiffs' counsel sent letters to Discovery Zone in late August 1995, and to Blockbuster and Viacom in early September 1995, alleging that Plaintiffs were victims of sexual harassment by Discovery Zone managers. See Keely Aff., PP 3, 4. In a subsequent telephone call, Plaintiffs' counsel told Taylor that he was inquiring whether the companies "had a policy of pre-suit negotiation and settlement." See *id.* at P 8. Taylor proceeded to investigate the claims. Plaintiffs' counsel attests that Taylor subsequently called and told him that "he had completed his investigation of the allegations" and "had determined that no illegal sexual harassment had taken place at Discovery Zone." Flamhaft Aff., PP 4-5.

The Court does not consider Taylor's investigation and representations to opposing counsel, in response to threats of litigation and pre-suit settlement overtures, to constitute participation by Blockbuster in the alleged discriminatory employment practices at Discovery Zone or an exercise of control over Discovery Zone's labor relations. Plaintiffs do not allege that Taylor sexually harassed any of the Plaintiffs or that he played a role in any decision affecting Plaintiffs' employment.

plaintiff's direct superiors, determined the condition of plaintiff's employment, evaluated her annual performance, and had power to affect her promotions).

3. Common Management

It is undisputed that, from June 1995 to Spring 1996, Steve Berrard and Al Detz acted as CEO and CFO, respectively, of both Blockbuster and Discovery Zone. In addition, Sumner Redstone, the CEO of Viacom, served on Discovery Zone's Board of Directors. As a general matter, the Court must consider evidence of common management "in the light of the well established principle that directors and officers holding positions with a parent and its subsidiary can and do change hats to represent the two corporations separately, despite their common ownership." *Lusk*, 129 F.3d at 779 (citation omitted).

The fact that two of Blockbuster's upper management served similar roles at Discovery Zone does not establish that Blockbuster exercised control over the operations and employment practices at Discovery Zone. [*313] See *Kelber*, 799 F. Supp. at 331 (finding no integration between related entities even though certain high level management employees performed functions for both companies). There is no evidence that either Berrard or Detz wore the two companies' hats interchangeably during the limited period of their dual service. The two entities maintained distinct management [**25] structures. See Taylor Tr. at 47. Detz testified that Berrard, in his capacity as CEO of Discovery Zone, had minimal interaction with Discovery Zone's human resources department. See Detz Tr. at 85-86. Rather, Donna Moore, the Chief Operating Officer of Discovery Zone, had a direct daily working relationship with the human resources department. See Detz Tr. at 86. Moore had no contact with Blockbuster's COO. See Detz Tr. at 87-88; Taylor Tr. at 47.

Given the limited number of dual officers, the interim basis upon

which they served at Discovery Zone, and the lack of evidence that those officers participated in any respect in the employment decisions affecting Plaintiffs, the Court finds Plaintiffs' evidence of common management insufficient for a finding of an integrated enterprise.

4. Common Ownership

Discovery Zone is not wholly owned by Blockbuster. Rather, Blockbuster owns 49.9% of Discovery Zone's stock. "Ownership of a controlling interest in a corporation entitles the controlling stockholder to exercise the normal incidents of stock ownership, such as the right to choose directors and set general policies, without forfeiting the protection of limited liability." [**26] *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 180 (5th Cir. 1981). Thus, in the absence of any participation by Blockbuster in Discovery Zone's employment and labor decisions, its status as a major shareholder in Discovery Zone is insufficient to consider the two entities an integrated enterprise. See *Triche v. Crescent Turnkey & Engineering, L.L.C.*, 1998 U.S. Dist. LEXIS 4137, No. Civ. A. 97-2657, 1998 WL 139986, at *4 (E.D. La. March 25, 1998) (holding that defendant company's forty percent ownership of employer company could not support finding of single employer where plaintiff failed to present evidence that defendant company had any control over employer company's employment decisions); Gerzog v. London Fog Corp., 907 F. Supp. 590, 600 (E.D.N.Y. 1995) (dismissing Title VII claim where plaintiff failed to demonstrate that major stockholder significantly affected his employment or engaged in any discriminatory conduct); *Kellett v. Glaxo Enterprises, Inc.*, 1994 U.S. Dist. LEXIS 17021, 91 Civ. 6237, 1994 WL 669975, at *5 (S.D.N.Y. Nov. 30, 1994) (stating that "cases . . . have established that common ownership of entities
is, by itself, essentially irrelevant").

Thus, despite the egregiousness of the alleged discriminatory [**27] acts at Discovery Zone, the Court finds that Blockbuster

played no part in the discriminatory conduct, and that Blockbuster is not sufficiently interrelated with Discovery Zone to be held liable for that conduct as Plaintiffs' employer under Title VII.

III. Blockbuster's Status as Employer Under the New York Human Rights Law

In determining whether a defendant can be held liable as a plaintiff's employer under the New York Human Rights Law ("NYHRL"), courts consider the following elements: (1) whether the proposed employer had the power of the selection and engagement of the employee; (2) whether the proposed employer made the payment of salary or wages to the employee; (3) whether the proposed employer had the power of dismissal over the employee; and (4) whether the proposed employer had the power to control the employee's conduct. See *Robins v. Max Mara, U.S.A., Inc.*, 923 F. Supp. 460, 470 (S.D.N.Y. 1996); *Goyette v. DCA Advertising Inc.*, 830 F. Supp. 737, 746 (S.D.N.Y. 1993). Further, "the most important consideration in this analysis is 'whether the alleged employer exercised control over the employee's conduct and the incidents of his employment.'" Robins, [**28] 923 F. Supp. at 470 (quoting *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 246 (E.D.N.Y. 1994)); see also *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998); *Dortz v. City of New York*, 904 F. Supp. 127, 147 n.8 (S.D.N.Y. 1995).

For the reasons discussed in Section II, supra, the Court finds that Plaintiffs' claims [*314] against Blockbuster and Viacom fail under the NYHRL as well. Plaintiffs have failed to present evidence that Blockbuster or Viacom exercised control over Plaintiffs' conduct the incidents of their employment in any respect. In addition, although Blockbuster processed Discovery Zone's payroll, Discovery Zone's funds were maintained in its own bank and payroll accounts. Thus, Discovery Zone paid its employees' wages. Accordingly, the Court grants Defendants summary judgment on the state statutory claims.

IV. Blockbuster Cannot Be Held Liable as Partner of Discovery Zone

In opposition to Defendants' motion, Plaintiffs argue that Blockbuster can be held liable for the alleged discriminatory acts of Discovery Zone under partnership principles. In their Amended Complaint, however, Plaintiffs did not assert claims based upon partnership law or [**29] principles. Even if Plaintiffs had asserted such claims, the Court finds this argument meritless.

The existence of a partnership depends upon "'the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses, and whether there was a combination of property, skill or knowledge.'" *Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994) (quoting *Ramirez v. Goldberg*, 82 A.D.2d 850, 439 N.Y.S.2d 959, 961 (2d Dept. 1981)); see also *Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (examining various aspects of relationship to determine existence of partnership in absence of written agreement) (citing *Brodsky v. Stadlen*, 138 A.D.2d 662, 526 N.Y.S.2d 478, 479 (2d Dept. 1988)). Plaintiffs concede that there is no written or oral partnership agreement here, but rather rely on a partnership "by implication." See Pls.' Opp'n Mem. at 25-26. There is no evidence, either expressed or implied, that Blockbuster, Viacom, and Discovery Zone intended to create a partnership. Nor is there evidence that Discovery Zone shared in the profits [**30] or losses of either Blockbuster or Viacom. To the contrary, Blockbuster and Discovery Zone maintained separate bank accounts. Accordingly, the Court rejects Plaintiffs' eleventh-hour partnership theory.

CONCLUSION

For the foregoing reasons, the Court grants summary judgment in favor of Defendants.

It is So Ordered.

Dated: New York, New York

August 25, 1998

Mary Johnson Lowe

United States District Judge